88-1004

Supreme Court, U.S.
FILED
DEC 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

NO. _____

IN THE MATTER OF: CAMBRIDGE PROPERTIES, INC.

Debtor

CAMBRIDGE PROPERTIES, INC.,

Petitioner

=versus=

BATON ROUGE PRODUCTION CREDIT ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Appeal From The United States Court
Of Appeal, Fifth Circuit, No. 88-3133
And From The United States District Court
For The Eastern District Of Louisiana
(CA-87-4154-E (4)

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE FIFTH CIRCUIT OPINION IS DIRECTLY CONTRARY TO EXPRESS PROVISIONS OF THE BANKRUPTCY ACT AS INTERPRETED BY THE SUPREME COURT IN THE TIMBER'S CASE AND IN CONFLICT WITH THE NINTH CIRCUIT OPINION IN THE MATTER OF IN RE: CIMARRON INVESTORS, No. 87-2135 (9th Cir. June 3, 1988), IN HOLDING THAT AN OVER-SECURED MORTGAGE CREDITOR IS ENTITLED TO POST-PETITION PAYMENTS OF PRINCIPAL AND INTEREST AS ADEQUATE PROTECTION

II.

WHETHER THE BANKRUPTCTY COURT ERRED IN LIFTING STAY IN THIS MATTER WHILE THE DEBTOR WAS IN THE PROCESS OF RESOLVING ITS DEBT STRUCTURE AND WHETHER MORE TIME SHOULD HAVE BEEN GRANTED FOR SUCH PURPOSE, UNDER CIRCUMSTANCES WHERE THE DEBT STRUCTURE WAS RESOLVED SHORLY AFTER THE STAY WAS LIFTED.

LIST OF PARTIES

The following are parties to these proceedings:

Cambridge Properties, Inc.

Baton Rouge Production Credit Association

Whitney National Bank

Geoffrey H. Longenecker

Sara Fish Longenecker

Anita Fish

Herbert E. Longenecker

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

The opinions of the lower courts are not reported. The opinion of the Bankruptcy Court in Case No. 85-02098 "K", the opinion of the United States District Court, Eastern District of Louisiana in No. 87-4154-E (4), and of the United States Court of Appeal, Fifth Circuit, in No. 88-3133 are all set forth in the Appendix.

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STATEMENT OF JURISDICTION

This petition for writ of certiorari seeks to review an opinion of the United States Court of Appeal, Fifth Circuit, Case No. 88-3133, decided by the original panel on September 28, 1988, and concerning which a petition for rehearing and rehearing en banc was filed and denied on November 1, 1988. The Honorable Court has jurisdiction over the matter which is on appeal from prior orders of the United States Bankruptcy Court, Eastern District of Louisiana in matter number 85-02098 "K" dated July 31, 1987 and from the United States District Court, Eastern District of Louisiana, in matter number 87-4154-E (4), dated February 17, 1988. See United Sav. Ass'n v. Timbers of Inwood Forest, 108 S. Ct. 626 (1988).

STATUTES WHICH THE CASE INVOLVES: -

Bankruptcy Act, Section 362,
11 U.S.C. Section 362:

> (a) Except as provided in subsection (b) of this section, a petitionn filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of__
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the

case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

* * * "

Bankruptcy Act, Section 505
11 U.S.C. Section 505:

> "(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such claim . . . .
>
> "(b) To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of

such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose."

STATEMENT OF THE CASE

This matter arises out of Chapter 11 proceedings pending in the Eastern District of Louisiana. The Bankruptcy Judge ordered the debtor, Cambridge Properties, Inc. ("Cambridge") to make monthly "adequate protection" payments to the first mortgage holder, Production Credit Association of Baton Rouge ("PCA") and on its alleged default in doing so lifted the automatic stay permitting foreclosure on the only asset of the debtor. Dismissal of the proceedings or conversion to Chapter 7 was neither sought nor ordered in the Bankruptcy Court. The order of the Bankruptcy Judge lifting the stay was appealed to the District Court, which affirmed, and then to the Fifth Circuit. The Fifth Circuit panel affirmed the lifting of the stay stating that it

agreed with the district court's conclusion that the "[o]rder [lifting the stay] was reasonable in lieu of the mortgages and encumbrances on the subject property, the length of time which [Cambridge] had been in Chapter 11, and [Cabridge's] failure to comply with the adequate protection agreements which resulted from prior Bankruptcy Court hearings." [Panel Opinion, p. 7.] Rehearing and rehearing en banc were denied on November 1, 1988, and Cambridge Properties, Inc. has petitioned this Honorable Court for a writ of certiorari and review.

The sole asset of the debtor is a sixty acre operating horse farm situated in St. Tammany Parish, Louisiana. At the time of the filing of the petition herein, the mortgage debt structure of the debtor was as follows:

First - PCA	$390,000.00
Second - Whitney Bank	50,000.00
Third - Central Savings	900,000.00
Fourth - Central Savings	900,000.00

The fair market value of the property subject to those mortgages was approximately $1,250,000.00 to $2,200,000.00. The Central Savings & Loan Association mortgages consisted of those peculiar Louisiana security devices known as "collateral mortgages" and were given to secure debt totally unrelated to the debtor or the property subject of these proceedings. The issue of any liability of the debtor under those collateral mortgages depended solely on the outcome of then pending and severely contested litigation in Louisiana state courts involving something on the order of forty parties at interest. During the course of this Chapter 11 proceeding, that litigation was settlement resulting in the

release and cancellation of the Central mortgages completely on September 17, 1987, shortly after the Bankruptcy Judge lifted the stay in this matter.

From the outset, the Central situation clearly impacted the debt structure of the debtor because in the event that the debtor was able to clear the mortgages, which is what actually transpired, then there was massive equity in the property. Being the sole asset of the debtor the property was clearly necessary to reorganization. Alternatively, if those mortgages could not be cleared, reorganization would have been most difficult. All parties recognized and admitted these facts in the numerous conferences with the Bankruptcy Judge, who was kept advised of the settlement progress and the settlement agreement

(actually approved by the Bankruptcy Court in other proceedings then pending in the district), and of the implementation of the same (which required numerous actions by the parties, including a time consuming foreclosure of totally unrelated property, execution of numerous releases, execution and recording of numerous motions to dismiss the numerous litigations involved in the settlement directly or indirectly, and so on). In early 1988, the settlement was completed with the exception of a mere recording of the Central notes marked cancelled. The final implementation of this massive settlement was actually occuring when the Bankruptcy Court acted ex parte without a hearing on PCA's motion to lift the stay in this matter which is the order subject of this appeal. As a matter of fact, the settlement agreement

was in fact totally completed by the debtor in this matter and the final conclusion of the agreement was a mere technicality -- namely, recordation of the cancelled mortgage notes affecting the property of the debtor in this matter.

Central, however, had misplaced the actual notes involved! Under Louisiana law, physical recordation of the notes effects a cancellation of the mortgage. The alternative, in the event the notes could not be found, would have been a further court proceeding with an expensive bonding requirement, which Central offered to accomplish in the event the notes did not turn up. They were finally located, however, and cancelled on September 17, 1987, which is a matter of record in these proceedings and were cancelled completely on September 17,

1988. (Appendix, pages 49 and 50.) Thus, while as a matter of reality, the debtor had all along had the equity it claimed in the property and the proof on the public record was accomplished on September 17, 1988.

Nevertheless, against this background of obvious good faith effort on the part of the debtor to resolve indebtedness bearing against its property, which effots were in fact successful, the Bankruptcy Judge, on the persistent motions of Production Credit, entered an order compelling the debtor, among other things, to make monthly cash payments to PCA in an amount more than interest on the note alone. The debtor acknowledges that it was present at conferences concerning this issue, but, with utmost due respect points out that the orders of the bankruptcy

judge order these payments came only after that judge stated that unless some monies were paid that he would lift the stay. They were not consent or agreed orders at all, as represented to this Honorable Court. The debtor refused to sign any such orders. But the debtor did its best to comply with them and believes that it in fact complied with those orders which it considered erroneously entered then and now. It was then, and is now, the position of the debtor that PCA is obviously over-secured as to its mortgage and that absent the collateral mortgages to Central, concerning which the debtor denied any liability, the debtor would have substantial equity in the property, a fact which was admitted by PCA at every hearing on the issue. The debtor's position in the property is now clearly

proven by the record in this matter. It is the debtor's position that it is not obligated to provide adequate protection to this over-secured creditor beyond its own over-security in the property.

It was the further position of the debtor that the PCA loan itself was not even delinquent in any event and that in fact the loan was at all times current, whether or not any monies were paid to PCA during the course of the Chapter 11 proceedings. The record indicates, and the panel correctly found, that there was a $500,000.00 mortgage on the property. However, the facts are that PCA never fully funded the $500,000.00 it had committed to fund and for which it had a mortgage, but merely funded $390,000.00 of its agreed committment. The difference is more than the total amount of money

involved alone. PCA's failure to fund its commitment and mortgage in fact caused the problems of the debtor to begin with.

There is no proof as to what payments the debtor made in the record beyond unsworn statements of counsel. The bankruptcy judge found that the debtor made payments to the creditor on September 26, 1986 and that thereafter, after yet another conference, on May 20, 1987 and June 20, 1987. On May 20, 1987, after the debtor had filed a plan and moved to have it confirmed, the bankruptcy judge ordered that if such payments ceased that he would automatically lift the stay without hearing. Subsequently, and there is no evidence in the record, the bankruptcy judge found that the debtor defaulted and lifted the stay on July 31, 1987. Confirmation hearings were not set on the

debtor's motion. Shortly thereafter the Central notes were found and the mortgages cancelled in the public records.

The debtor believes that the Fifth Circuit's opinion in this matter is erroneous and has petitioned this Court for review suggested that in light of recent decisions of the Supreme Court and the Ninth Circuit, that the Fifth Circuit's opinion is erroneous in that it clearly conflicts with the Supreme Court's opinion in Timbers and that of the Ninth Circuit of recent date, as hereinafter discussed.

ARGUMENT:

MAY IT PLEASE THE COURT:

I.

THE FIFTH CIRCUIT OPINION IS DIRECTLY CONTRARY TO EXPRESS PROVISIONS OF THE BANKRUPTCY ACT AS INTERPRETED BY THE SUPREME COURT IN THE TIMBER'S CASE AND IN CONFLICT WITH THE RECENT NINTH CIRCUIT OPINION IN THE MATTER OF IN RE: CIMARRON INVESTORS, No. 87-2135 (9th Cir. June 3, 1988) HOLDING TIMBERS RETROACTIVE.

II.

THE FIFTH CIRCUIT ERRED IN LIFTING STAY IN THE MATTER UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

The order of the Bankruptcy Court in this matter ordering the debtor to make periodic payments of principal and interest to PCA is contrary to the express provisions of the Bankruptcy Act as interpreted by the Supreme Court of the United States in the matter of United Sav. Ass'n v. Timbers of Inwood Forest, 108 S. Ct. 626 (1988). Further, the Fifth Circuit's opinion in the matter conflicts with Timbers and, by refusing to apply the same retroactively to the orders in question, with the Ninth Circuit's opinion in the matter of Cimarron Investors v. Wyid Properties, Slip Opinion dated June 7, 1988, Docket No. 87-2135, not as yet published.

It is respectfully submitted that the ordering a debtor to make "adequate protection" payments of princi-

pal and interest to an over-secured creditor clearly conflicts with the Bankruptcy Act. Mr. Justice Scalia in the Timbers case, supra, noted expressly that an over-secured creditor's claim is automatically protected under Section 506 of the Act which the Court cited as follows:

> "Section 506 of the Code defines the amount of the secured creditor's allowed secured claim and the conditions of his receiving postpetition interest. In relevant part it reads as follows:
>
> > "(a) An allowed claim of a creditor secured by a lien on property in which

the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such claim . . . .

"(b) To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any

reasonable fees, costs, or charges provided for under the agreement under which such claim arose.'"

108 S. Ct. at 630. Further, the Supreme Court expressly discussed the type of situation presented here:

"Even more important for our purposes than Section 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims -- just as it denies over secured creditors postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the

collateral. Section 506(b) provides that "[t]o the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim.' (Emphasis added by the Court.) Since this provision permits postpetition interest to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest. See 11 U.S.C. Section 502(b)(2)."

108 S. Ct. at 630-1. With respect to

ordering actual cash payments to a creditor, that Section 361 provides that the court may do so in the event that and "to the extent that the stay under section 362 of this title . . . results in a decrease in the value of such entity's interest in such property," a situation not even suggested in this case. The Supreme Court, in further discussion of the legislative history of the Act further expressly noted that "[i]t is true that Section 506(b) gives the over secured creditor, despite lack of compliance with the conditions of Section 552, a similar priority over unsecured creditors; but that does not compromise the principle of Section 552 since the interest patyments come only out of the 'cushion' in which the oversecured creditor does have a perfected security interest." (Emphasis

added by the Court.). Id. at 632.

Thus, it is obvious that the order of the Bankruptcy Judge ordering periodic payments to begin with was erroneous under Timbers, which should be applied retroactively under the standard of Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971). See In re: Cimarron Investors, Ninth Circuit Slip Opinion, Docket No. 87-2135, dated June 8, 1988. Further, under the Cimarron decision, the debtor is in all probability further entitled to a refund of all monies wrongfully paid to this creditor pursuant to those orders and the matter should remanded to the Bankruptcy Court for such purpose alone. That was the precise holding of Cimarron under procedurally similar facts.

Further, the panel opinion in this matter would further seem to conflict with

the language of the Fifth Circuit's own opinion in the Timbers case on its way to the Supreme Court, cited with approval, in part, by the Supreme Court. In re Timbers of Inwood Forest Associates, Ltd., 808 F. 2d 363 (5th Cir. 1987). The Fifth Circuit, en banc, also rejected the secured creditor's claim for payment of interest during the Chapter 11 proceedings, expressly noting that if the delays to the creditor involved were inordinate, that his remedy was by way of motion to convert or dismiss the proceedings. Judge Clark specifically noted that "[i]n the case of most Chapter 11 debtors, however, a plan of reorganization can be effectuated, if at all, within a matter of months, not years. An occassional Chapter 11 debtor, for example, one with a complex debt structure or multifarious business

problems, may require more time." 808 F. 2d 363, 372. That is precisely the case here where the debtor started out of with a disputed and convoluted debt structure, as outlined above, which the debtor worked diligently to resolve and which the debtor did in fact resolve! The fact is that $1,800,000.00 of mortgages which bore on the property subject of this litigation today no longer bear against it and the morgage debt on the property presently is less than 50% to value. There is obviously a substantial equity cushion from which this clearly oversecured creditor could be paid. It is respectfully submitted, that in the words of the Supreme Court of the United States in the Timbers case - -

> "Petitioner offers no reason why Congress would want to provide relief for such an obstreperous and thoroughly unharmed creditor.

108 S. Ct. 626, 632.

Finally, the Supreme Court indicated that the substance of the inquiry under Section 362 was whether there was effective "reorganization is in prospect." 108 S. Ct. at 632. In this case, that fact is demonstrated by the debtor's efforts to totally eliminate, through its negotiations with one of the creditors, four times the debt that remains involved in this matter. The fact that a reorganization is in prospect is further proven by the plan filed in this matter long before the stay was lifted and the

motion of the debtor to confirm the same which was filed prior to the order subject of this appeal.

CONCLUSION

In short, the orders of the Bankruptcy Court were clearly erroneous as a matter of law. This Fifth Circuit should have determined the issues of law de novo, as pointed out in the Cimmaron matter, supra. The Fifth Circuit opinion is clearly contrary to the language of the Timbers opinion and should be reversed on the Bankruptcy issues alone. Further, this Court should reverse the Fifth Circuit's refusal to apply Timbers retroactively, as did the Ninth Circuit. The orders of the Bankruptcy Court should be set aside and the matter remanded to

the Bankruptcy Court for further consideration in light of Timbers and for hearings on confirmation of the debtor's plan of arrangement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record in this matter by depositing a copy of the same in the United States Mails, postage prepaid and properly addressed, first class.

Covington, Louisiana, this 7th day of December, 1988.

GEOFFREY H. LONGENECKER